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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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11 RONALD G FUCCI,

No C 06-1941 VRW

12 Petitioner,

ORDER

13 v

14 A P KANE, Acting Warden,

15 Respondent.

16 BOARD OF PAROLE HEARINGS,

17 Real party in interest.
18 _____/

19
20 Respondent Anthony Kane has moved to dismiss petitioner
21 Ronald Fucci's petition for habeas corpus claiming it is barred by
22 the one-year statute of limitations under 28 USC section 2244(d)(1).
23 Doc #7. Petitioner opposes respondent's motion and argues that his
24 petition was filed within the one-year limitations period. Doc #10.

25 The court has reviewed both parties' memoranda and finds
26 oral argument unnecessary to adjudicate this matter. For the
27 reasons stated herein, respondent's motion to dismiss is DENIED.

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"A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 USC section 2244(d)(1). The parties agree that section 2244(d)(1) applies, but disagree about when to begin counting the days and whether petitioner is entitled to tolling between his state-court filings. The following table sets forth the relevant dates and events.

Date	Event	Days from Previous Event
December 18, 2003	The Board of Prison Terms (BPT) ¹ conducted petitioner's parole hearing at issue. Doc #7, Ex 3.	-
March 1, 2004	Petitioner files an administrative appeal of the BPT's denial of his parole. Doc #7, Ex 4.	-
March 17, 2004	The BPT's decision to deny petitioner parole becomes final. Doc #7, Ex 3 at 76.	-
September 7, 2004	Petitioner files his habeas petition in Fresno County Superior Court. Doc #7, Ex 6.	-
September 30, 2004	Fresno County Superior Court denies petitioner's habeas petition. Doc #7, Ex 6.	0
January 5, 2005	Petitioner files his habeas petition in the court of appeals. Doc #7, Ex 7.	97
January 13, 2005	The court of appeals denies petitioner's habeas petition. Doc #7, Ex 8.	0
June 21, 2005	The BPT denies petitioner's appeal. Doc #10, Ex 1.	-
June 22, 2005	Petitioner files his habeas petition in California Supreme Court. Doc #7, Ex 9.	160
February 22, 2006	California Supreme Court denies petitioner's habeas petition. Doc #7, Ex 10.	0
March 14, 2006	Petitioner files habeas petition with this court. Doc #1.	20

¹The BPT was abolished on July 1, 2005 and replaced with the Board of Parole Hearings (BPH). See Cal Gov Code section 12838.4 (2007).

I

Subparagraph (D) of § 2244(d)(1) applies to habeas petitions challenging parole board decisions. See Shelby v Bartlett, 391 F3d 1061, 1065-66 (9th Cir 2004); Redd v McGrath, 343 F3d 1077, 1081-85 (9th Cir 2003). Subparagraph (D) mandates that the statute of limitations begins to run from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 USC section 2244(d)(1)(D). The "factual predicate" used by courts in habeas cases challenging parole board actions is the day the administrative appeal becomes final, subject to the petitioner receiving proper notice. Shelby, 391 F3d at 1066; Redd, 343 F3d at 1084.

Respondent agrees that the event triggering the statute of limitations is the date petitioner received the denial of his administrative appeal -- in this case, June 25, 2005. Doc #7 at 3. Respondent contends, however, that petitioner "waived his right to benefit from the statute of limitations rule" by filing his habeas petition in superior court before his administrative appeal was decided. *Id.* at 3-4. The court rejects this argument.

The sole case respondent cites in support of his waiver argument is United States v McGee, 993 F2d 184 (9th Cir 1993). In McGee, the United States brought suit against McGee for unpaid federal tax assessments. 993 F2d at 185. McGee did not dispute the merits of the government's claim but asserted that the government was time-barred from bringing the suit. *Id.* McGee submitted an offer in compromise to the IRS that contained the following waiver:

The taxpayer-proponents waive the benefit of any statute of limitations applicable to the assessment and collection of the liability sought to be compromised, and agree to

1 the suspension of the running of the statutory period of
2 limitations on assessment and collection for the period
3 during which this offer is pending, * * * and for 1 year
thereafter.

4 Id (ellipses in original). The IRS accepted McGee's offer. Id.

5 In McGee, the court was asked to determine the date on
6 which the offer in compromise was no longer pending and, thus, when
7 the waiver of the statute of limitations terminated. Id. The court
8 held that the waiver was valid -- and the statute of limitations
9 tolled -- until the government formally rejected McGee's offer, or
10 until McGee withdrew his offer. Id at 186.

11 Petitioner, by contrast, a prisoner challenging the BPT's
12 decision to deny him parole, filed a habeas petition in pro per in
13 superior court after waiting in vain nearly six months for the BPT
14 to issue a decision on his administrative appeal. Petitioner's
15 impatience was perhaps not without basis: the BPT did not issue a
16 decision on petitioner's appeal until June 21, 2005--over sixteen
17 months after petitioner filed his administrative appeal and one day
18 before petitioner filed his habeas petition in the California
19 Supreme Court. Doc #10, Ex 1; Doc #7, Ex 9. Under respondent's
20 reading of McGee, the court must impute to petitioner an intent to
21 waive the benefit of the rule that the statute of limitations begins
22 to run only upon the issuance of a final administrative decision.

23 The court finds little resemblance between McGee and the
24 instant case. McGee, an employer who conceded that he failed to pay
25 the government money he withheld from his employees' wages for
26 taxes, voluntarily entered into a contractual relationship with the
27 Internal Revenue Service that tolled the statute of limitations
28 running against the government while the parties tried to reach a

1 compromise and included an express, written waiver. Petitioner can
2 hardly be analogized to the employer in McGee.

3 Respondent further invokes a scenario in which a habeas
4 petitioner, by proceeding to exhaust his judicial remedies while his
5 administrative appeal was still pending, "could wait indefinitely
6 for the administrative decision without the statute ever running."
7 Resp Reply at 3. The factual predicate of this scenario, however,
8 is that the responsible agency perpetually failed to act on the
9 administrative appeal; under respondent's theory, the prisoner would
10 never receive a final administrative decision and his claim would
11 therefore never become ripe for adjudication in the courts. While
12 this might be more convenient for the potential habeas respondents
13 in such cases, it would hardly be a just state of affairs. A better
14 solution would be more timely processing of administrative appeals.

15 II

16 The statute of limitations is tolled upon the filing of a
17 collateral challenge in state court until there is final resolution
18 in the state system. See 28 USC section 2244(d)(2); Evans v Chavis,
19 546 US 189, __ (2006); Carey v Saffold, 536 US 214, 219-20 (2002);
20 Brown v Poole, 337 F3d 1155, 1158 (9th Cir 2003). But if the
21 petitioner "unreasonably delays" in filing a subsequent petition
22 after the lower court's denial, the claim is no longer "pending" and
23 will not toll the statute of limitations. See Chavis, 546 US 189,
24 __ (2006); Saffold, 536 US at 225-27; Gaston v Palmer, 447 F3d 1165,
25 1166-67 (9th Cir 2006).

26 Respondent argues that petitioner unreasonably delayed in
27 filing his petition with both the court of appeals and the
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1 California Supreme Court. Doc #7 at 4-5. Petitioner essentially
2 concedes that the 160-day lapse of time between the court of
3 appeal's denial and his filing in the California Supreme Court was
4 "unreasonable" but denies that the other two delays were not
5 reasonable. The court finds it unnecessary to delve into the
6 details of this issue. In light of the court's ruling that the
7 statute of limitations did not begin to run before petitioner's
8 state court filing, the tolling issue cannot affect the outcome of
9 this motion. According to the chart on page 2 above, the three
10 periods of delay totaled 277 days. Assuming, arguendo, that tolling
11 was unavailable and all of these time periods counted toward the
12 limitations period, petitioner still filed his federal habeas
13 petition well within 2244(d)(1)'s one-year limitations period.

14 For the forgoing reasons, respondent's motion to dismiss
15 is DENIED. Respondent shall now respond on the merits to the order
16 to show cause dated July 27, 2006. Doc #2. Respondent's response
17 is due on or before May 4, 2007.

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19 IT IS SO ORDERED.

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22 VAUGHN R WALKER
23 United States District Chief Judge
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